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**UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA**

Erica Welker	Case No: 08-CV-2259-MMA-WMc
Plaintiff,	Plaintiff's Opposition to Defendant's
v.	Motion to Dismiss Pursuant To Fed.
Law Offices of Daniel J. Horwitz	R. Civ. P. 12(b)(6) and California
Defendant.	Anti-SLAPP Legislation and
	Requests for Fees and Costs
	Date: March 20, 2009
	Time: 2:30 PM
	Location: Courtroom 5, Federal
	Courthouse, San Diego, CA

HYDE & SWIGART
 San Diego, California

TABLE OF CONTENTS

Table of Contents	2
Table of Authorities	3
Cases	3-5
Pending Cases	5
Statutes	5
Congressional Reports.....	6
Exhibits and Declarations.....	6
Introduction.....	7
Issues Before The Court	8
Argument	8
1. Defendant violated the FDCPA and the Rosenthal Act because it failed to state the full amount of the alleged debt in its initial communication with Ms. Welker, pursuant to 15 U.S.C. § 1692g(a)(1).....	8
2. Defendant violated the FDCPA and the Rosenthal Act when it failed to advise Plaintiff in its initial communication that any dispute by Plaintiff had to be in writing, pursuant to 15 U.S.C. § 1692g(a)(4) and (a)(5).....	11
3. Defendant’s claim that its violations of federal and state law are privileged pursuant to Cal. Civ. Code § 47 is meritless	14
4. California’s anti-SLAPP statute does not apply in this case, and even if it did, Defendant has not met its burden.....	16
5. Defendant's request for attorneys’ fees and costs pursuant to 15 U.S.C. § 1692k(a)(3) is premature, unwarranted, and meant only to intimidate	19
Conclusion	20

TABLE OF AUTHORITIES

CASES

Abels v. JBC Legal Group, P.C.

428 F. Supp. 2d 1023 (N.D. Cal. 2005).....9

Baker v. G.C. Services Corp.

677 F.2d 775 (9th Cir. 1982)10, 14

Camacho v. Bridgeport Fin. Inc.

430 F.3d 1078 (9th Cir. 2005)11, 12

Clark v. Capital Credit & Collection Servs.

460 F.3d 1162 (9th Cir. 2006).....9, 10, 12, 13

Christiansburg Garment Co. v. EEOC

434 U.S. 412, 418 (1978)14

Daniel Edstrom v. All Services and Processing

2005 U.S. Dist. LEXIS 2773, 2005 WL 645920 (N.D. Cal. 2005).....9

Dupuy v. Weltman

442 F. Supp. 2d 822 (N.D. Cal. 2006)9, 10, 11

Equilon Enterprises v. Consumer Cause, Inc.

29 Cal.4th 53 [124 Cal. Rptr. 2d 507, 52 P.3d 685] (2002).....17, 18

FDIC v. Schuchmann

319 F.3d 1247, 1250 (10th Cir. 2003)20

Guerrero v. RLM Acquisitions LLC

499 F.3d 926 (2007)20

Hearn v. W. Conference of Teamsters Pension Tr. Fund

68 F.3d 301 (9th Cir. 1995)15

Heintz v. Jenkins

514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995)14

Jarrow Formulas, Inc. v. LaMarche

31 Cal.4th 728, [3 Cal. Rptr. 3d 636, 74 P.3d 737] (2003).....16, 19

Lamie v. United States Trustee

540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004)12

Mann v. Quality Old Time Service, Inc.

120 Cal. App. 4th 90, 15 Cal. Rptr. 3d 215 (2004).....19

Mello v. Great Seneca Financial Corp.

526 F. Supp. 2d 1024 (C.D. Cal. 2007)15, 19

Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.

214 F.3d 872 (7th Cir. 2000)10, 11

Paul for Council v. Hanyecz

85 Cal. App. 4th 1356, 102 Cal. Rptr. 2d 864 (2001).....17

People ex. rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.

86 Cal. App. 4th 280, 285, 103 Cal. Rptr. 2d 71 (2000).....17

Peter v. GC Servs. L.P.

310 F.3d 344 (5th Cir. 2002)10

Postow v. Oriental Bldg Ass'n

455 F. Supp. 781 (D.D.C. 1978).....14

Rosenthal v. Great Western Fin. Securities Corp.

14 Cal.4th 394 (1996).....18

Rouse v. Law Offices of Rory Clark

465 F. Supp. 2d 1031 (S.D. Cal. 2006).....17, 18

Security Pac. Nat'l Bank v. Resolution Tr. Corp.

63 F.3d 900, 904 (9th Cir. 1995)15

Sial v. Unifund CCR Partners

2008 US Dist LEXIS 66666 (S.D. Cal. 2008)16

Simpson v. Lear Astronics Corp.

77 F.3d 1170, 1177 (9th Cir. 1995).....20

Sterling Energy, Ltd. v. Friendly Nat'l Bank

744 F.2d 1433, 1435 (10th Cir. 1984)20

1	<i>Swanson v. Southern Or. Credit Serv.,</i>	
2	869 F.2d 1222 (9th Cir. 1988)	9, 10
3	<i>Wilson v. Parker, Covert & Chidester</i>	
4	28 Cal.4th 811 [123 Cal. Rptr. 2d 19, 50 P.3d 733] (2002)	19
5	<i>Yates v. Allied Int'l Credit Corp.</i>	
6	578 F. Supp. 2d 1251 (S.D. Cal. 2008)	16
7	PENDING CASES	
8	<i>Curiel v. Law Offices of Daniel J. Horwitz</i>	
9	Case No. 08-CV-2262-MMA-WMC (S.D. Cal. 2008)	7
10	STATUTES	
11	Cal. Civ. Code § 47	8, 14, 16, 20
12	Cal. Civ. Code § 425.16	8, 16, 17, 19
13	Cal. Civ. Code § 1788.15(a)	15
14	Cal. Civ. Code § 1788.15(b)	15
15	Fair Debt Collection Practices Act	
16	15 U.S.C. §§ 1692 et seq. ("FDCPA")	Passim
17	Rosenthal Fair Debt Collection Practices Act	
18	California Civil Code §§ 1788-1788.32 ("Rosenthal Act")	Passim
19	15 U.S.C. § 1692(a)	18
20	15 U.S.C. § 1692a(6)	14
21	15 U.S.C. § 1692g	10, 12
22	15 U.S.C. § 1692g(a)(3)	12, 19, 20
23	15 U.S.C. § 1692g(a)(4)	11-13
24	15 U.S.C. § 1692g(a)(5)	11-13
25	15 U.S.C. § 1692i	15
26	15 U.S.C. § 1692k(a)(3)	19, 20
27		
28		

CONGRESSIONAL REPORTS

S. Rep. No. 382, 95th Cong. 2d Sess. 4,
reprinted in 1977 U.S. Code Cong. & Admin. News 1695, 16999

EXHIBITS AND DECLARATIONS

Declaration of of Daniel J. Horwitz
Def's Motion, Exhibit A.8, 9, 13

HYDE & SWIGART
San Diego, California

1 **I. INTRODUCTION**

2 The Law Offices of Daniel J. Horwitz (“Horwitz”) is a law firm engaged in
3 trying to collect alleged debts for a doctor who operates a “surgery center facility”
4 in San Diego. Ms. Welker’s story is identical to that of Ms. Shannon Curiel, who
5 also has a case before the Southern District,¹ and others that Plaintiff is aware of
6 who are being defrauded by Horwitz’s client, and who have identical stories, but
7 who have not filed suit, and who will be witnesses in the state trial in which
8 Horwitz’s client and Ms. Welker and Ms. Curiel are litigating claims for breach of
9 contract, torts, and consumer actions.

10 In summary, all of these persons, those who filed suit, as well as those who
11 did not, allege that Horwitz’s client is involved in a form of fraud in which
12 Horwitz’s client, along with another doctor, misrepresent insurance involvement in
13 medical procedures and what, if anything, the patients of these doctors will have to
14 pay for certain surgeries. When the insurance companies refused to continue
15 paying on questionable claims submitted by Horwitz’s client, he began trying to
16 collect money not owed from patients who had been told they would have to pay
17 nothing. These attempts to coerce money from patients began primarily because
18 the business relationship between the two doctors became estranged. However,
19 while that aspect of this matter is somewhat complicated, it is also largely relevant
20 only to the state actions, and is offered here merely as background.

21 Here, it is suffice to say that Horwitz is an attorney who regularly collects
22 debts for his clients, and is attempting to collect from Ms. Welker the debt that this
23 surgery center claims is owed. And, as Horwitz and his client know, Ms. Welker
24 vehemently denies any such debt is owed by her.

25
26
27 ¹ Ms. Welker’s matter, 08-CV-2259, and Ms. Curiel’s matter, 08-CV-2262 were originally
28 assigned to different judges. On Plaintiff’s Motion, both cases are now before the Court. Briefing
is essentially identical.

1 While attempting to collect this alleged debt, Horwitz, a self acknowledged
2 debt collector,² had delivered to Ms. Welker a letter in which Horwitz, as a debt
3 collector, violates both state and federal debt collection statutes. It is the content of
4 this letter that forms the basis for this action.

5 **II. ISSUES BEFORE THE COURT**

- 6 1. Does a debt collector violate the Fair Debt Collection Practices Act, 15
7 U.S.C. §§ 1692 et seq. ("FDCPA") and the Rosenthal Fair Debt Collection
8 Practices Act, California Civil Code §§ 1788-1788.32 ("Rosenthal Act")
9 when it fails to state in its initial communication with the consumer the full
10 amount of the alleged debt?
- 11 2. Does a debt collector violate the FDCPA and the Rosenthal Act when it fails
12 to advise consumers in its initial communication that the consumer must
13 make certain disputes in writing?
- 14 3. Are Horwitz's actions privileged pursuant to Cal. Civ. Code § 47?
- 15 4. Has Horwitz properly filed a motion pursuant to California's anti-SLAPP
16 statute, Cal. Civ. Code § 425.16, does it apply, and has Horwitz met his
17 burden?
- 18 5. Can the Court, at this stage, consider Horwitz's current allegation that Ms.
19 Welker filed this action in bad faith and for the purpose of harassment, and
20 has Horwitz met his burden?

21 **III. ARGUMENT**

- 22 **1. Defendant violated the FDCPA and the Rosenthal Act because it failed**
23 **to state the full amount of the alleged debt in its initial communication**
24 **with Ms. Welker, pursuant to 15 U.S.C. § 1692g(a)(1).**

25 When Congress designed the FDCPA, "[i]t added the validation of debts
26

27 ² See Exhibit A of the Declaration of of Daniel J. Horwitz, attached to Defendant's Motion, in
28 which Horwitz states that "This office is acting as a debt collector. Any information obtained will
be used for that purpose."

1 provision specifically to ensure that debt collectors gave consumers adequate
2 information concerning their legal rights.” *Swanson v. Southern Or. Credit Serv.*,
3 869 F.2d 1222 (9th Cir. 1988), citing S. Rep. No. 382, 95th Cong. 2d Sess. 4,
4 reprinted in 1977 U.S. Code Cong. & Admin. News 1695, 1699.

5 The FDCPA is a strict liability statute. *Clark v. Capital Credit & Collection*
6 *Servs.*, 460 F.3d 1162, 1176 (9th Cir. 2006) (“As our colleagues in other circuits
7 have concluded, this broad language seems to make the FDCPA a strict liability
8 statute.”) The Rosenthal Act is based on and incorporates by reference the FDCPA.
9 *Dupuy v. Weltman*, 442 F. Supp. 2d 822, 825 fn. 1 (N.D. Cal. 2006); see also *Abels*
10 *v. JBC Legal Group, P.C.*, 227 F.R.D. 541-1; citing *Daniel Edstrom v. All Services*
11 *and Processing*, 2005 U.S. Dist. LEXIS 2773, 2005 WL 645920 (N.D. Cal. 2005),
12 (California has incorporated by reference the text of certain federal provisions into
13 the [Rosenthal Act], rather than copying them verbatim into the California code.)
14 Because the Rosenthal Act incorporates the FDCPA by reference, it requires
15 compliance with the substantive provisions of the FDCPA and is also strict liability.

16 In paragraphs 24 through 26 of her Complaint, Plaintiff alleges that the
17 October 2, 2008 letter is the initial communication by Defendant, and Defendant
18 acknowledges this in the Declaration of Daniel J. Horwitz, paragraphs 2 and 3. The
19 FDCPA requires a debt collector to provide, as part of its initial communication
20 with a consumer, or within five days after that initial communication, a written
21 notice. Part of this written notice must contain “the amount of the debt.” 15 U.S.C.
22 § 1692g(a)(1).

23 In *Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162, 1174 (9th Cir.
24 2006), the Ninth Circuit noted that the FDCPA prohibits the false representation of
25 “the character, amount, or legal status of any debt. In the October 2, 2008 letter,³
26 the initial communication here, Defendant tells Plaintiff that the “*principal* amount
27 of [the] claim” is \$23,508.61. (Italics added.) The letter then goes on to state that

28 ³ Exhibit A of the Declaration of Daniel J. Horwitz.

1 Defendant is collecting “[Plaintiff’s] outstanding balance, interest at the legal rate,
2 and reimbursement of court costs related to your past-due account for medical
3 services rendered.” No other statement is made with regard to the amount of the
4 debt, and these vague statements leave open the issue of what is actually alleged by
5 Defendant to be owed. In the Ninth Circuit, the impact of language alleged to
6 violate section 1692g is judged under the “least sophisticated debtor” standard.
7 *Baker v. G.C. Services Corp.*, 677 F.2d 775, 778 (9th Cir. 1982). See also, *Swanson*
8 *v. Southern Or. Credit Serv.*, 869 F.2d 1222 (9th Cir. 1988).

9 The leading case on the issue before the Court is Judge Posner’s decision in
10 *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872
11 (7th Cir. 2000), a case that is factually similar to the case here. In *Miller*, the debt
12 collector demanded the “unpaid *principal* balance” (italics are Judge Posner’s) and
13 added, “this amount does not include accrued but unpaid interest, unpaid late
14 charges, escrow advances or other charges....” *Id. at* 875. The Seventh Circuit
15 held that such a statement is inadequate under the FDCPA. “The statement does not
16 comply with the Act ... The unpaid principal balance is not the debt; it is only a part
17 of the debt; the Act requires statement of the debt.” *Id.* See also, *Peter v. GC Servs.*
18 *L.P.*, 310 F.3d 344 (5th Cir. 2002) (“Although the text of § 1692g does not explicitly
19 provide that the disclosures required by it must be made in a non-confusing manner,
20 courts have held that the statute implies that the required disclosures be set forth in
21 a form and within a context that does not distort or obfuscate its meaning.) See
22 also, *Swanson v. Southern Or. Credit Serv.*, 869 F.2d 1222 (9th Cir. 1988).

23 And while the Ninth Circuit has not yet ruled on this issue directly, the
24 Northern District of California has, adopting the Seventh Circuit’s *Miller* analysis.
25 In *Dupuy v. Weltman*, 442 F. Supp. 2d 822 (N.D. Cal. 2006), the Northern District
26 held that “Section 1692g(a)(1) requires debt collectors “to state the total amount
27 due - interest and other charges as well as principal - on the date the dunning letter
28 was sent.” ” 442 F. Supp. 2d at 827. In *Dupuy*, the court found that a letter in which

1 the debt collector indicated interest might be due violated the FDCPA because, just
2 as here, the debt collector did not indicate the amount of that interest.

3 Here Defendant has done what the defendants did in *Miller and Dupuy*. He
4 sent an initial letter and demanded, not a specific figure as required by the FDCPA
5 the Rosenthal Act, but \$23,508.61 *plus interest at the legal rate, and reimbursement*
6 *of court costs*. As the Seventh Circuit has made clear, this statement does not
7 comply with the FDCPA. “The unpaid principal balance is not the debt; it is only a
8 part of the debt; the Act requires statement of the debt.” *Miller v. McCalla, Raymer,*
9 *Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872, 875 (7th Cir. 2000).
10 Consequently, Defendant has violated the FDCPA and the Rosenthal Act, and these
11 statutes impose liability on Defendant.

12 **2. Defendant violated the FDCPA and the Rosenthal Act when it failed to**
13 **advise Plaintiff in its initial communication that any dispute by Plaintiff**
14 **had to be in writing, pursuant to 15 U.S.C. § 1692g(a)(4) and (a)(5).**

15 “[The FDCPA] assigns lesser rights to debtors who orally dispute a debt and
16 greater rights to debtors who dispute it in writing.” *Camacho v. Bridgeport Fin.*
17 *Inc.*, 430 F.3d 1078, 1082 (9th Cir. 2005). Defendant's erroneously argue that the
18 Ninth Circuit's ruling in *Camacho* provides that “it is no longer proper to allege that
19 the dispute must be ‘in writing.’”⁴ This is a misstatement of *Camacho* and the law.
20 In *Camacho*, the Ninth Circuit stated that a debt collector violates the FDCPA when
21 it adds the phrase “in writing” to the requisite part of the notice in the FDCPA when
22 that phrase does not exist in the statute. The issue there was whether a debt
23 collector could require a consumer to dispute a debt in writing when the section
24 under which the consumer was disputing the debt did not require such a writing.
25 The court held it could not.

26 The issue here is whether debt collectors may delete the phrase “in writing”
27 from a different portion of the FDCPA than that reviewed in *Camacho* without
28

⁴ Defendant's Motion, page 3, Line 19, § 3.

1 violating the FDCPA. The Ninth Circuit decisions in *Camacho* and *Clark v. Capital*
 2 *Credit & Collection Servs., Inc.*, 460 F.3d 1162 (9th Cir. 2006), make it clear they
 3 may not. The Ninth Circuit looked to the Supreme Court's decision in *Lamie v.*
 4 *United States Trustee*, 540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004)
 5 and considered whether a debt collector misrepresented the rights of consumers
 6 under the FDCPA when it added the words "in writing" to the portion of its notice
 7 required by section 1692g(a)(3).⁵ The Ninth Circuit held that it did violate the
 8 FDCPA because "we must give effect to the plain meaning of the statute," and,
 9 because section 1692g(a)(3) does not include the phrase "in writing," and it cannot
 10 be added by the debt collector.

11 Here, Plaintiff deleted the phrase "in writing" from different sections of the
 12 statute that specifically state the debt collector must include the phrase "in writing,"
 13 that is, sections 1692g(a)(4) and (a)(5). For the same reasons explained by the
 14 Ninth Circuit in *Camacho*, a debt collector likewise cannot delete such a phrase.

15 In *Camacho*, the court explained that, "The plain meaning of § 1692g is that
 16 debtors can trigger the rights under subsection (a)(3) by either an oral or written
 17 "dispute," while debtors can trigger the rights under subsections (a)(4) and (a)(5)
 18 only through written dispute." 430 F.3d, at 1081.

19 The court went on to explain that "Because we conclude that the FDCPA's
 20 statutory scheme, which assigns lesser rights to debtors who orally dispute a debt
 21 and greater rights to debtors who dispute it in writing, is not absurd, we are not at
 22 liberty to insert any additional language." 430 F.3d, at 1082. The FDCPA assigns
 23 *lesser* rights to debtors who orally dispute a debt and *greater* rights to debtors who
 24 dispute it in writing. Thus, by failing to advise consumers they can only dispute the

25 ⁵ 15 U.S.C. § 1692g(a)(3) states that, "Within five days after the initial communication with a
 26 consumer in connection with the collection of any debt, a debt collector shall, unless the
 27 following information is contained in the initial communication or the consumer has paid the
 28 debt, send the consumer a written notice containing – a statement that unless the consumer, within
 thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the
 debt will be assumed to be valid by the debt collector;"

1 debt under sections (a)(4) and (a)(5) *in writing*, Defendant denies consumers the
2 greater rights afforded them, and Defendant is not at liberty to delete that language.

3 Defendant's Motion even acknowledges this fatal point in its Motion. On page
4 3, lines 24-26, Defendant states that, "A consumer is entitled to dispute a debt orally
5 to overcome a collector's assumption that a debt is valid, *although only a written*
6 *dispute of the debt triggers the collector's duty to provide verification of the*
7 *debt.*" (Italics added.) Nowhere in Defendant's letter does Defendant advise
8 consumers that they must dispute the debt "in writing" if consumers want to trigger
9 the protections of subsections (a)(4) and (a)(5).⁶

10 The Ninth Circuit advises that "[w]ell-established canons of statutory
11 construction provide that any inquiry into the scope and meaning of a statute must
12 begin with the text of the statute itself. [citations] They further caution that, "where
13 the statute's language is plain, the sole function of the courts is to enforce it according
14 to its terms ... for courts must presume that a legislature says in a statute what it
15 means and means in a statute what it says there." " [citations] 460 F.3d at 1168.

16 The Ninth Circuit has also stated that when a debt collector engages in debt
17 collection, it is the debt collector that must ensure that it adheres to the law, or accept
18 the consequences.

19 Most important, because the FDCPA is a remedial statute aimed
20 at curbing what Congress considered to be an industry-wide
21 pattern of and propensity towards abusing debtors, it is logical
22 for debt collectors—repeat players likely to be acquainted with
23 the legal standards governing their industry—to bear the brunt of
24 the risk. (Footnote omitted.) As we have oft repeated, it does
25 not seem "unfair to require that one who deliberately goes
26 perilously close to an area of proscribed conduct shall take the
27 risk that he may cross the line." (Internal citations omitted.)

28 *Clark*, 460 F.3d at 1172-1173.

⁶ See Exhibit A of the Declaration of of Daniel J. Horwitz.

1 **3. Defendant's claim that its violations of federal and state law are**
 2 **privileged pursuant to Cal. Civ. Code § 47 is meritless.**

3 An FDCPA plaintiff is the "chosen instrument of Congress to vindicate a policy
 4 that Congress considered of the highest priority." *Postow v. Oriental Bldg Ass'n*, 455
 5 F. Supp. 781, 785 (D.D.C. 1978), *aff'd in part and rev'd in part on other grounds*,
 6 627 F.2d 1370 (D.C. Cir. 1980) (applying to the Truth in Lending Act the description
 7 in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978)). "Congress
 8 clearly intended that private enforcement actions would be the primary enforcement
 9 tool of the [FDCPA]." *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 780-81 (9th Cir.
 10 1982).

11 The United States Supreme Court has held that when attorneys collect debts,
 12 they are debt collectors pursuant to the FDCPA. *Heintz v. Jenkins*, 514 U.S. 291,
 13 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995). In that same decision, the Supreme
 14 Court held that any claim of litigation privilege is "unconvincing." The FDCPA
 15 applies to the activity of attorneys "even when that activity consists of litigation."
 16 *Id.*, at 299. The Court's holding:

17 Held: The Act must be read to apply to lawyers engaged in
 18 consumer debt-collection litigation for two rather strong
 19 reasons. First, a lawyer who regularly tries to obtain payment
 20 of consumer debts through legal proceedings meets the Act's
 21 definition of "debt collector": one who "regularly collects or
 22 attempts to collect, directly or indirectly, [consumer] debts
 23 owed . . . another," 15 U.S.C. § 1692a(6). Second, although an
 24 earlier version of that definition expressly excluded "any
 25 attorney-at-law collecting a debt as an attorney on behalf of and
 26 in the name of a client," Congress repealed this exemption in
 27 1986 without creating a narrower, litigation-related, exemption
 28 to fill the void. Heintz's arguments for nonetheless inferring the
 latter type of exemption – (1) that many of the Act's
 requirements, if applied directly to litigation activities, will
 create harmfully anomalous results that Congress could not
 have intended; (2) that a postenactment statement by one of the
 1986 repeal's sponsors demonstrates that, despite the removal of

1 the earlier blanket exemption, the Act still does not apply to
2 lawyers' litigating activities; and (3) that a nonbinding
3 "Commentary" by the Federal Trade Commission's staff
4 establishes that attorneys engaged in sending dunning letters
5 and other traditional debt-collection activities are covered by
6 the Act, while those whose practice is limited to legal activities
7 are not – are unconvincing.

8 Further evidence that Congress did not envision a litigation privilege is in the
9 statute itself. As part of the FDCPA, in 15 U.S.C. § 1692i, Congress provides that
10 any debt collector who brings legal action on a debt against a consumer must sue in
11 the proper venue or violate the Act. If a litigation privilege existed, section 1692i
12 would be superfluous. “We must avoid a construction which renders any language
13 of the enactment superfluous.” *Security Pac. Nat'l Bank v. Resolution Tr. Corp.*, 63
14 F.3d 900, 904 (9th Cir. 1995). See also, *Hearn v. W. Conference of Teamsters*
15 *Pension Tr. Fund*, 68 F.3d 301, 304 (9th Cir. 1995) (“Only where a sensible result
16 isn't reachable may we resort to the drastic step of ignoring ... statutory
17 language... .”)

18 The same holds true for the Rosenthal Act. See *Mello v. Great Seneca*
19 *Financial Corp.*, 526 F. Supp. 2d 1024, 1031 (C.D. Cal. 2007) (California's
20 litigation privilege cannot immunize a debt collector under California's Rosenthal
21 Act.) When the California legislature passed the Rosenthal Act, it included Cal.
22 Civ. Code § 1788.15(a), which states that a debt collector may not collect or attempt
23 to collect a debt “by means of judicial proceedings when the debt collector knows
24 that service of process, where essential to jurisdiction over the debtor or his
25 property, has not been legally effected.” Cal. Civ. Code § 1788.15(b) reinforces this
26 argument by stating that any debt collector who brings legal action in an improper
27 venue violates the Rosenthal Act. If the litigation privilege applied in Rosenthal
28 Act matters, these section would be pointless. The legislature clearly intended the
Rosenthal Act to apply to litigation.

Courts have supported this proposition. In *Sial v. Unifund CCR Partners* 2008 US Dist LEXIS 66666 (S.D. Cal. 2008), the court held that because Cal. Civ. Code § 47 and the Rosenthal Act are irreconcilable,

Applying the privilege ... would effectively vitiate the Rosenthal Act and render the protections it affords meaningless.” [citations] “Thus, the court “applies the familiar principle of statutory construction that, in cases of irreconcilable conflict, the specific statute prevails over the general one,” (Internal citations omitted) and finds that the Rosenthal Act prevails over the statutory litigation privilege.

In *Yates v. Allied Int’l Credit Corp.*, 578 F. Supp. 2d 1251 (S.D. Cal. 2008), the court made the very point Plaintiff argues here:

The litigation privilege does not apply to the claim brought under the California Fair Debt Collection Practices Act (“the Rosenthal Act”) ... At this point, there is sufficient direct precedent, generated by the district courts within the Ninth Circuit, excepting the Rosenthal Act from the scope of the privilege. In addition, the [United States] Supreme Court has previously held that the FDCPA applies to the litigation activities of attorneys who regularly engage in debt collection. (Internal citations omitted.) This Supreme Court decision further supports the conclusion that litigation privilege would not override a law protecting against unfair debt collection practices.

4. California’s anti-SLAPP statute does not apply in this case, and even if it did, Defendant has not met its burden.

A) California’s Code Civ. Proc. § 425.16 two prong approach.

Resolution of an anti-SLAPP motion requires the court to engage in a two-step process. *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733, [3 Cal. Rptr. 3d 636, 74 P.3d 737].

First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one

1 arising from protected activity. The moving defendant's burden
 2 is to demonstrate that the act or acts of which the plaintiff
 3 complains were taken 'in furtherance of the [defendant]'s right
 4 of petition or free speech under the United States or California
 5 Constitution in connection with a public issue,' as defined in the
 6 statute. (§ 425.16, subd. (b)(1).) If the court finds such a
 showing has been made, it then determines whether the plaintiff
 has demonstrated a probability of prevailing on the claim.

7 *Id.*, citing *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67
 8 [124 Cal. Rptr. 2d 507, 52 P.3d 685].

9 (i) *Defendant has not demonstrated that the challenged cause of action is*
 10 *one arising from protected activity.*

11 Defendant has not demonstrated that the challenged cause of action is one arising
 12 from protected activity, and this cannot be demonstrated because the activity
 13 challenged is illegal activity. Cal. Civ. Code § 425.16 does not apply to an illegal act
 14 on the part of defendant, even if that act is in furtherance of defendant's right of
 15 petition or free speech within the meaning of Code Civ. Proc. § 425.16. See, e.g.,
 16 *Paul for Council v. Hanyecz* (2001) 85 Cal. App. 4th 1356, 1367, 102 Cal. Rptr. 2d
 17 864, *overruled in part* by *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.
 18 4th 53, 67, 124 Cal. Rptr. 2d 507 ; *People ex. rel. 20th Century Ins. Co. v. Building*
 19 *Permit Consultants, Inc.* (2000) 86 Cal. App. 4th 280, 285, 103 Cal. Rptr. 2d 71.

20 (ii) *Debt collection violations are not protected by California's Code Civ.*
 21 *Proc. § 425.16.*

22 The Southern District of California has already held that Defendant's theory
 23 lacks merit – the Code Civ. Proc. § 425.16 does not apply to debt collectors trying
 24 to collect on a debt. As the South District has noted, "The stated intent of the anti-
 25 SLAPP statute is 'to encourage continued participation in matters of public
 26 significance.' " *Rouse v. Law Offices of Rory Clark*, 465 F. Supp. 2d 1031, 1037 n. 5
 27 (S.D. Cal. 2006) "The court notes that although debt collection practices, issues of
 28 privacy, and personal identity protections are matters of considerable public interest

1 these days, the interactions between [consumers and debt collectors] cannot
 2 reasonably be construed other than as involving a particular private dispute.” *Id.*
 3 The *Rouse* court went on to say that, “In order to meet their threshold burden, [the
 4 defendant] must demonstrate [the plaintiff’s] challenged claims are *based* on
 5 conduct in the exercise of Defendants’ protected rights.” (Internal citations omitted,
 6 italics are the court’s.) *Id.*

7 In *Rouse*, the court refused to find that the activities of a debt collector met
 8 the first prong because “the communications giving rise to this lawsuit occurred
 9 between private parties and relate to transaction affecting only the actual debtor,
 10 [and] the tactics Defendants used to pursue collection of a particular debt....” 465
 11 F. Supp. 2d at 1038. And, just as here, the court pointed out there could be no
 12 matters of public significance, as “[t]he Complaint and briefing in connection with
 13 the anti-SLAPP motions raise no suspicion he [the defendant] pursues his claims
 14 other than to succeed on the merits.” [citations].

15 The Southern District’s position is bolstered by the fact that both the FDCPA
 16 and the Rosenthal Act are specifically designed to protect the privacy interests of
 17 consumers, and protect those interests from being made public. Congress wrote the
 18 FDCPA, in part, to address “invasions of individual privacy” by debt collectors. 15
 19 U.S.C. § 1692(a). Ignoring this, Defendant argues that its collection efforts are a
 20 matter of public significance. They clearly are not.

21 *(iii) Plaintiff has stated and substantiated a legally sufficient claim.*

22 If a court ruling on an anti-SLAPP motion concludes the challenged cause of
 23 action arises from protected petitioning, it then “determines whether the plaintiff
 24 has demonstrated a probability of prevailing on the claim.” *Equilon*, supra, 29 Cal.
 25 4th at 67. To satisfy this second prong, the plaintiff must “state[] and substantiate[]
 26 a legally sufficient claim.” *Rosenthal v. Great Western Fin. Securities Corp.* (1996)
 27 14 Cal.4th 394, 412. “Put another way, the plaintiff ‘must demonstrate that the
 28 complaint is both legally sufficient and supported by a sufficient prima facie

1 showing of facts to sustain a favorable judgment if the evidence submitted by the
2 plaintiff is credited.' ” *Jarrow*, supra, 31 Cal.4th at 741, citing *Wilson v. Parker,*
3 *Covert & Chidester* (2002) 28 Cal.4th 811, 821 [123 Cal. Rptr. 2d 19, 50 P.3d 733].

4 “However, a cause of action may only be stricken under the anti-SLAPP
5 statute if it arises from protected speech or petitioning activity and lacks even
6 minimal merit. ... Where a cause of action refers to both protected and unprotected
7 activity and a plaintiff can show a probability of prevailing on *any part of its claim*,
8 the cause of action is not meritless and will not be subject to the anti-SLAPP
9 procedure.” *Mello v. Great Seneca Financial Corp.*, 526 F. Supp. 2d 1024, 1029
10 (C.D. Cal. 2007) citing *Mann v. Quality Old Time Service, Inc.*, 120 Cal. App. 4th
11 90, 106, 15 Cal. Rptr. 3d 215 (2004) (internal citation omitted, and emphasis in
12 original).

13 Here Plaintiff has demonstrated that she will prevail not only on one of the
14 two alleged violations, but both. As argued above, Defendant violated the FDCPA
15 and the Rosenthal Act by failing to provide proper notice. Defendant further
16 violated by failing to provide consumers with the “amount of the debt,” as required.
17 Consequently, Defendant's attempt to invoke *Code Civ. Proc. § 425.16* is meritless.

18 **5. Defendant's request for attorneys' fees and costs pursuant to 15 U.S.C. §**
19 **1692k(a)(3) is premature, unwarranted, and meant only to intimidate.**

20 *A) Defendant is falsely representing to this Court that Defendant believes*
21 *the underlying debt is undisputed.*

22 Defendant tries to falsely paint Plaintiff as an irresponsible person that
23 refuses to accept responsibility for her debts. In arguing its request for attorneys'
24 fees and costs, Defendant represents to the Court that Plaintiff is suing, not because
25 Defendant violated the law, but because the creditor had “the temerity of requesting
26 that she pay what she owes.” Defendant knows perfectly well this is not true.
27 Defendant represents the creditor. Does he really expect the Court to believe that,
28 as the creditor's attorney, he does not know his client is being sued in state court by

1 Plaintiff because his client is attempting to collect thousands of dollars that are not
2 owed? Plaintiff is a victim of fraud, and Defendant must know this.

3 *B) 15 U.S.C. § 1692k(a)(3) requires a finding by the Court of bad faith*
4 *and the purpose of harassment, and this is a high standard.*

5 An award under 15 U.S.C. § 1692k(a)(3) requires the defendant first prevail,
6 and the district court must then make two findings before it may award attorneys'
7 fees and costs to the defendant. *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170,
8 1177 (9th Cir. 1995) ("We stress that the district court must make detailed findings
9 in support of any award.") First, the district court must find that the action was
10 "brought in bad faith" and second, the that the action was brought "for the purposes
11 of harassment." Defendant, who has not prevailed, argues neither bad faith nor a
12 purpose to harass, much less both. Further, the Ninth Circuit has held that the
13 standard for determining that an FDCPA action is brought in bad faith and for the
14 purpose of harassment is high. In *Guerrero v. RLM Acquisitions LLC*, 499 F.3d
15 926 (2007), the Ninth Circuit found that "minimally colorable" arguments are
16 adequate to avoid a finding of bad faith and purpose of harassment under the
17 FDCPA. *Id.*, at 940. See also, *FDIC v. Schuchmann*, 319 F.3d 1247, 1250 (10th Cir.
18 2003), quoting *Sterling Energy, Ltd. v. Friendly Nat'l Bank*, 744 F.2d 1433, 1435
19 (10th Cir. 1984). ("A party acts in bad faith only when the claim brought is entirely
20 without color and has been asserted wantonly, for purposes of harassment or delay,
21 or for other improper reasons.")

22 **IV. CONCLUSION**

23 It is axiomatic that debt collectors tend to be abusive, and Defendant is no
24 exception. Discussions concerning whether Defendant violated the FDCPA and the
25 Rosenthal Act by failing to provide proper notice and the amount of the debt can be
26 excused as proper arguments, albeit poorly researched. However, Defendant's
27 attempts at invoking every attorneys' fees provision it can think of are frivolous.
28 These attacks are meant only to intimidate consumers who, as Defendant knows

1 only too well, are financially distressed and hardly in a position to endure such a
2 ruling. Rather than properly research the law and take responsibility for its actions,
3 Defendant chooses a transparent attack on the plaintiff in the hope that she will be
4 intimidated enough to dismiss a meritorious case.

5 For the above reasons, Defendant's motion should be denied in its entirety.

6
7 Respectfully submitted,

8 Date: February 17, 2009

Hyde & Swigart

9 By: /s/Robert L. Hyde
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11 Attorneys for the Plaintiff

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